

JOAQUÍN CARCAÑO, et al.,

Plaintiffs,

vs.

ROY A. COOPER, et al.,

Defendants,

vs.

PHIL BERGER, et al.,

Intervenor-Defendants.*

Case No. 1:16CV236

Winston-Salem, North Carolina

June 25, 2018

10 a.m.

APPEARANCES:

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P R O C E E D I N G S

THE COURT: All right. Good morning. We're here on Carcaño versus Governor Cooper, et al., which is 1:16CV236.

Let me ask you all to go ahead and note your appearances for the record, if you would. Let me start with the Plaintiffs.

MR. STRANGIO: Chase Strangio for the ACLU with the Plaintiffs. With me at counsel table is James Esseks, also from the ACLU, and Chris Brook from the ACLU North Carolina.

THE COURT: All right. Good.

MR. SCHWARTZ: Stephen Schwartz with Schaerr Duncan for the Intervenor-Defendants, and with me is Gene Schaerr and Robert Potter.

MR. SURI: Vivek Suri from Jones Day for the UNC Defendants and present with me is Kristen Lejnieks, also from Jones Day. And, sorry, we also have Tom Shanahan and Carolyn Pratt.

MS. VYSOTSKAYA: Olga Vysotskaya from the North Carolina Department of Justice on behalf of all the Executive Branch Defendants.

THE COURT: Thank you for coming. I set this for hearing because I wanted to give you an opportunity to speak some more to the issues that are raised. I read all the materials you've presented as to the motion to dismiss the Fourth Amended Complaint.

1 I also have before me the proposed consent decree entered
2 into between the Plaintiffs and the Governor. It's not clear
3 to me whether the Defendants had intended to respond to the
4 consent decree and there's been some passage of time. So I
5 don't know whether anybody intended to address that. I do have
6 some questions about that as well.

7 But let me start first with the motion to dismiss. As I've
8 said, I've read all the materials and so you don't necessarily
9 need to go over everything in detail. You're welcome to put
10 that -- I don't believe the microphone is hooked up, so you're
11 welcome to speak from the table, if you wish.

12 **MR. SCHWARTZ:** That's fine, Your Honor. Fine. Would
13 you prefer I stand?

14 **THE COURT:** Yes, please.

15 **MR. SCHWARTZ:** Of course, Your Honor.

16 Your Honor, again, it's Stephen Schwartz for the
17 Intervenor-Defendants. A few remarks about the -- to hit the
18 highlights from the motion to dismiss. Obviously, I'm prepared
19 for any questions you have.

20 The original subject of this lawsuit, H.B. 2, was repealed
21 in broad bipartisan compromise more than a year ago. Since
22 then this is a lawsuit looking for a reason to exist. H.B. 2's
23 replacement, H.B. 142, is a procedural rule that sets for the
24 North Carolina state government when certain government
25 policies will be made and certain legislation can be enacted.

1 The State's decision to proceed in this way does not give rise
2 to a justiciable claim.

3 To challenge H.B. 142, Plaintiffs need to have standing and
4 they need a ripe injury. Plaintiffs have only two theories of
5 injury, neither of which are justiciable. Their first
6 injury -- the first alleged injury is an uncertainty about the
7 applicable legal standard for access to certain public
8 facilities, but uncertainty by itself has never been considered
9 a basis -- a basis for federal jurisdiction.

10 As the Supreme Court held in *National Park Hospitality*,
11 many activities, including most business transactions, would
12 benefit in some way from additional clarity about parties --
13 parties' legal rights and obligations, but that -- but the
14 potential benefits of additional clarity have never been
15 considered to be an edict into federal court.

16 If uncertainty were enough for jurisdiction, every single
17 area where legislature has left the law silent for some reason
18 or where it could add clarity could enable a lawsuit by parties
19 who would prefer to have one of a particular rule, but that
20 simply isn't the law. Even if uncertainty could point to a
21 legal injury, it wouldn't be traceable to H.B. 142 and wouldn't
22 be addressed -- or redressed, excuse me, by invalidation of
23 H.B. 142.

24 Insofar as Plaintiffs claim that state law facility access
25 is uncertain, it was uncertain before H.B. 2 was passed

1 originally and Plaintiffs concede that they aren't asking this
2 Court to impose a statewide rule.

3 **THE COURT:** Well, their argument now is that it's
4 become a little more -- I don't know if I want to say
5 "certain." And they can speak for it. But they say in light
6 of the -- as I understand the argument, in light of the passage
7 of time and the events of this case, it becomes more apparent
8 now that under current law maybe they're not permitted to enter
9 the restrooms with which they identify.

10 **MR. SCHWARTZ:** I'm not sure why that would be the
11 case, though, because they haven't challenged any trespass law.
12 They haven't added as a defendant any local law enforcement who
13 enforces trespass law. They haven't asked this Court to adopt
14 a -- an interpretation of a trespass law.

15 **THE COURT:** Well, they have the proposed declaration
16 of the mother from Wilmington who says that the school
17 superintendents, for example, are blaming H.B. 142 for their
18 decision.

19 **MR. SCHWARTZ:** Well, it's a little bit unclear from
20 the declaration what exactly the school board is saying, but at
21 any rate, the -- all that H.B. 142 says is that decisions about
22 facility access have to be based on statewide -- statewide law.

23 The question of what, if anything, the local school board
24 is basing its decision, whatever its decision is, on, that must
25 be a question of some law other than H.B. 142. If H.B. 142

1 were repealed or enjoined, the local school board would still
2 have that -- that authority. In fact, it would have even
3 greater authority to make that kind of decision because, unlike
4 now, when certain kinds of local -- of local and agency
5 policymaking are preempted by H.B. 142, repealing or enjoining
6 H.B. 142 would open all of that up. The outcome of that is
7 uncertain. It would probably vary from local jurisdiction to
8 local jurisdiction. Different agencies might adopt
9 different -- different approaches.

10 But the -- but all of that just underscores the fact that
11 to the extent that there is uncertainty, it comes from laws
12 that -- other than H.B. 142. It comes from uncertainty about
13 the application of laws the Plaintiffs haven't challenged,
14 haven't asked this Court to interpret, couldn't ask this Court
15 to interpret authoritatively because they're state laws and
16 which, in any event, are necessarily very fact driven.

17 So the result is that even if this Court granted the kind
18 of -- granted the kind of relief they've asked for, namely,
19 enjoining H.B. 142, the uncertainty that they -- that allegedly
20 animates their complaint wouldn't go away. It might even
21 increase the uncertainty results from other laws and from other
22 governments and state -- levels of state government, state
23 actors who aren't before the Court.

24 **THE COURT:** But does the State of North Carolina have
25 the authority to determine how it's going to interpret the

1 state trespass laws and other laws? And let me start with the
2 proposition that -- as I recall, H.B. 2 dealt only with state
3 facilities. Wasn't that right? It did not deal with
4 private-sector facilities, only with state facilities.

5 **MR. SCHWARTZ:** I believe it had some aspects having to
6 do with private-sector facilities, but I think it is
7 principally concerned with --

8 **THE COURT:** I'm sorry. H.B. 2.

9 **MR. SCHWARTZ:** Yeah, that's what I mean, H.B. 2.

10 **THE COURT:** Okay. So does the Governor, as the chief
11 law enforcement officer, if you will, in the state, have the
12 authority to define who can go into what restrooms, for
13 example, today under current law?

14 **MR. SCHWARTZ:** I believe that the -- I can't speak
15 for -- I can't speak for the Governor. My colleague,
16 Ms. Vysotskaya, will be able to speak for the Executive Branch
17 Defendants as far as -- as far as the authority of the state
18 executive to authoritatively govern access into state
19 facilities.

20 **THE COURT:** I presume the Governor could issue an
21 Executive Order that gives his interpretation. He may very
22 well already have done that. We'll get to that, I imagine. I
23 mean, I'm presented with a proposed consent decree, which seems
24 to accomplish some of that, which suggested to me maybe the
25 Governor has the authority as a -- I would presume to be the

1 chief law enforcement officer, to say how his administration
2 intends to enforce trespass law as it applies to transgender
3 individuals.

4 **MR. SCHWARTZ:** Well, there are a couple of aspects of
5 that. One is the Governor's executive power as head of the
6 state government. There was an Executive Order that was
7 promulgated by -- by the former governor, Governor McCrory,
8 interpreting H.B. -- H.B. 2, but, of course, it wouldn't have
9 the force of law if the underlying statute has been repealed
10 and replaced with H.B. 142. Presumably, the Governor could
11 still -- could issue another Executive Order. Again, my
12 colleague would be best situated to answer those questions.

13 **THE COURT:** All right.

14 **MR. SCHWARTZ:** The other aspect of your question,
15 though, relates to the Governor's -- relates to the Executive
16 Branch's authority as -- as head of the -- head of law
17 enforcement and there it's worth pointing out -- and I have the
18 citations here -- that the -- that enforcement -- criminal
19 enforcement of trespass law isn't actually housed with the
20 Attorney General. That's housed in local law enforcement,
21 indeed the local prosecutors. That's North Carolina
22 Constitution Article IV, Section 18, and North Carolina
23 Statutes 114-2 and 114-11.6. That means that, to the extent
24 that Plaintiffs are concerned about trespass law, nobody in
25 this case can -- can control how trespass law will be enforced.

1 **THE COURT:** But doesn't trespass law, though, depend
2 on whether or not somebody has permission to enter?

3 **MR. SCHWARTZ:** That's exactly right, Your Honor.

4 **THE COURT:** And so can the Governor define who has
5 permission to enter?

6 **MR. SCHWARTZ:** Well --

7 **THE COURT:** Whether or not the Governor chooses to
8 enforce the law.

9 **MR. SCHWARTZ:** Well --

10 **THE COURT:** I mean, if I tell you you have permission
11 to come to my home, then you have permission to enter my home.
12 Presumably at some point if I tell you you need to leave and
13 you don't, then you would be trespassing, but you wouldn't be
14 trespassing if I gave you permission to enter my home. Now,
15 that may not stop a police officer from suggesting you've
16 trespassed in my house, but you would have consent as a defense
17 to that. Why wouldn't that be the same situation here?

18 **MR. SCHWARTZ:** Well, there are a few aspects to that.
19 Point number one is that -- I go back to my justiciability
20 point. As you said, even if H.B. 142 were repealed, there
21 would still be trespass law and the Governor would still have
22 that authority; meaning that to the extent Plaintiffs are
23 concerned about a trespass law, it all just folds back into the
24 fact that their -- that their trespass law arguments are rooted
25 in trespass law. They aren't rooted in H.B. 142 and repeal or

1 enjoined -- or an injunction against H.B. 142 wouldn't make a
2 difference.

3 Beyond that -- again, there are still two aspects of the
4 Governor's authority with respect to trespass law. One is with
5 respect to -- with respect to state property, where -- where
6 the Governor has certain kinds of authority; and the other is
7 with respect to private property, where -- where the Governor
8 obviously wouldn't have that kind of authority.

9 With respect to -- with respect to state property, I think
10 what the -- what the -- what H.B. 142 says is that -- is that
11 access to certain kinds of facilities has to be determined with
12 respect to state law and it would include, you know, again,
13 trespass -- a trespass law.

14 **THE COURT:** My question, though, doesn't that beg the
15 question of who's a trespasser and who isn't and can't --
16 wouldn't the Governor have the authority to say, "The following
17 people would not be considered trespassers on state property"?

18 **MR. SCHWARTZ:** That's likely the -- the case, but
19 that -- but, again, it's presumably the Attorney General who
20 would be able to answer that question authoritatively.

21 You're absolutely correct, though, Your Honor, that
22 trespass law hinges on notice. There are two sections to the
23 trespass statute. One says you're a trespasser if the owner of
24 the property, you know, tells you to leave, he gives you notice
25 that you aren't allowed to be there anymore, and you need to

1 leave. The other aspect of trespass law is you're a trespasser
2 if there's a notice posted that puts you on notice that you
3 aren't allowed to be there.

4 But application of both of those aspects of trespass law,
5 it depends on the facts and particular circumstances. It
6 depends on what kind of facility it is, how exactly it's been
7 posted, who owns the property, what a person does to attract
8 the attention of the person who owns the property, all of these
9 are very fact-specific kind of circumstances.

10 And what H.B. 2 says is that, essentially, instead of
11 promulgating at either the state level -- at the local level or
12 an agency level -- instead of promulgating generally
13 applicable, one-size-fits-all regulations, the issue of access
14 to the facilities has to be determined based on -- based on,
15 you know, the circumstances of particular -- particular cases
16 and that's an issue that's not before this Court right now.
17 Plaintiffs haven't raised any particular trespass. They
18 haven't indicated any particular circumstance of trespass in
19 their pleadings.

20 This Court's preliminary injunction decision addresses the
21 fact that -- I mean, as far as I'm aware, the kind of issue
22 hasn't come up and so that goes to Plaintiffs' standing to --
23 to -- so even if -- even if trespass issues were before this
24 Court at all and under the Fourth Amended Complaint, it still
25 raises serious concerns about justiciability, particularly, you

1 know, standing arguments.

2 **THE COURT:** All right.

3 **MR. SCHWARTZ:** Plaintiffs' other claim of injury --
4 unless you have additional questions about the uncertain
5 facility access, Plaintiffs other claim of -- of a justiciable
6 injury rests on the change that H.B. 2 made in North Carolina
7 political processes. The Plaintiffs cite no case where a
8 party's standing derives from having to pursue their preferred
9 policies in one political forum rather than in another. If
10 they could, then essentially every preemption provision in
11 state law or federal law would give rise to an Article III
12 injury by people who claim to be injured by having to go to the
13 forum that isn't the forum of their choice.

14 As the Supreme Court held just last week in *Gill versus*
15 *Whitford*, the Wisconsin redistricting case, one's interest in
16 the policymaking of local government bodies is a generalized
17 interest. It's not an interest that's particularized to
18 particular people, meaning that an abridgment of one's interest
19 in local policymaking is yet another -- it's a generalized
20 grievance that doesn't give rise to Article III standing.

21 That's particularly the case here where the political
22 process set up by H.B. 142 is perfectly equal and evenhanded.
23 Everyone, whatever policy on facility access or discrimination
24 law he or she might prefer, has to seek it in exactly the same
25 way in exactly the same forum. Thus, having to pursue

1 Plaintiffs' preferred policy -- facility access rules in the
2 General Assembly --

3 **THE COURT:** But don't the Plaintiffs argue, though,
4 that they're the ones that are being discriminated against;
5 that effectively what the preemption provision is doing is
6 prohibiting them from seeking protection against discrimination
7 at the municipal level; and in light of the need now to have to
8 get the vote of the General Assembly, which is harder to do
9 given the issues and the composition of the General Assembly,
10 that they're being discriminated against because the drafters
11 of the bill should have known that Plaintiffs might have more
12 success at the local level than they would statewide?

13 **MR. SCHWARTZ:** I believe that is a fair way of stating
14 Plaintiffs' claims, but it's worth bearing in mind that -- that
15 there isn't kind of a one-way ratchet in this case. There's a
16 wide range of different kinds of policies different people want
17 to pursue. Remember, H.B. 142 repealed H.B. 2, which had been
18 the law of the state up until just over -- just over a year
19 ago. The -- the proponents of H.B. 2 are out of luck to
20 exactly the same extent and potentially even a greater extent
21 than the Plaintiffs are because everybody has to -- everybody
22 has to go in to the General Assembly, which has just repealed
23 H.B. 2.

24 Plus, of course, there's the fact that H.B. 2 regulates --
25 I mean, it regulates third parties and the response of third

1 parties, particularly government entities, to a change in law
2 or to a judicial decision. It's always been considered to
3 be -- the response independent of the parties, especially ones
4 who aren't before the Court, has always been considered to be
5 speculative. Nobody knows what different entities would do --
6 in a particular locality would do. All Plaintiffs do in their
7 complaint is indicate that on information and belief certain
8 jurisdictions, conspicuously not including Charlotte, would
9 enact certain kinds of -- of antidiscrimination provisions, but
10 ultimately that's only guesswork. Plus, of course --

11 **THE COURT:** What is the test I'm supposed to apply for
12 determining whether the preemption provision is discriminatory?
13 Is it an equal protection analysis?

14 **MR. SCHWARTZ:** No. It's a standing analysis at this
15 stage. Well, we've raised both jurisdictional issues and
16 merits issues as for the -- as for the effect of -- of H.B. 142
17 on the political process.

18 What the Supreme Court said in *Lujan* was that the elements
19 of standing have to be addressed using the same standards that
20 apply at a particular stage of a proceeding where you are. And
21 at a motion to -- at the motion to dismiss stage, Plaintiffs
22 need to prove -- they need to allege standing sufficient to
23 meet the standard to get past a motion to dismiss.

24 **THE COURT:** Would it matter if there were allegations
25 and evidence that the preemption provision was adopted for the

1 sole purpose of discriminating against transgender individuals?

2 **MR. SCHWARTZ:** If there were allegations that it was
3 adopted for the sole purpose -- well, one, it wouldn't -- I
4 don't think that's necessarily a standing issue because with
5 standing you need an injury. If -- I don't know. If the
6 General Assembly had held a Special Session to stick pins into
7 a voodoo doll, Plaintiffs wouldn't be injured. They couldn't
8 go to court over that. That's just one very extreme example.

9 So for purposes of jurisdiction, even if there were some
10 kind of intent, I don't think the Plaintiffs have cited and I'm
11 not aware of a case where an act that would otherwise not give
12 rise to a justiciable injury suddenly does create a justiciable
13 injury purely because of the intent behind it.

14 The issue of intent does go to the merits. We think that
15 the justiciability issues in Plaintiffs' Fourth Amended
16 Complaint are fully sufficient to dismiss Plaintiffs'
17 complaint, but even if this Court did wish to address --
18 address merits, we consider Plaintiffs' allegations of intent
19 to be so thin that they don't create a plausible interest that
20 would be necessary. But at any rate, that goes to the equal
21 protection issue, Your Honor.

22 As a matter of equal protection, too, though, you need --
23 intent alone wouldn't be enough. You need -- you need a
24 combination of intent and injury; and if there isn't enough
25 injury to give rise to standing and a ripe claim, then a

1 *fortiori* you wouldn't have the -- there wouldn't be a -- there
2 wouldn't be the kind of injury that you need to make out an
3 equal protection claim.

4 **THE COURT:** All right.

5 **MR. SCHWARTZ:** So for similar reasons -- I've
6 addressed principally the standing arguments that we've raised
7 in our motion to dismiss, but for similar reasons, Plaintiffs'
8 claims aren't ripe. As I've mentioned, the issues of facility
9 access and the application of trespass law are inherently and
10 unavoidably fact-based, but Plaintiffs haven't alleged the
11 particular facts of any particular trespass. For that reason,
12 their -- their allegations haven't crystallized to the point
13 that a -- that a judicial process is possible -- is possible
14 under Article III and they haven't alleged the kind of hardship
15 that justifies a needed judicial process.

16 As I mention again, we've moved to dismiss based on both --
17 both justiciability arguments and merits arguments. Again, we
18 consider our merits argument -- we consider our justiciability
19 arguments to be adequate. I'm happy to address the merits.

20 But taking a step back more generally and in conclusion,
21 the fact that Plaintiffs target H.B. 142 after H.B. 2's repeal
22 shows that -- what the amended complaint is really all about.
23 This is ultimately an effort to blow up a complex political
24 compromise on a controversial issue and to achieve a political
25 victory that the Plaintiffs could not achieve through the

1 political process. But without standing and ripeness, this is
2 just a policy dispute that's outside of this Court's Article
3 III jurisdiction.

4 **THE COURT:** All right. Thank you.

5 Mr. Suri.

6 **MR. SURI:** Thank you, Judge Schroeder.

7 Even if you disagree with every single word out of
8 Mr. Schwartz's mouth right now, we submit that you should still
9 dismiss the UNC Defendants from this case. The UNC Defendants
10 didn't enact H.B. 142. They didn't, like some members of the
11 legislature, make statements suggesting criminal consequences
12 as a result of H.B. 142. They have no authority to enforce
13 H.B. 142, all of which shows that any injury is not traceable
14 to the UNC Defendants.

15 In addition, they have no power to issue a clarification of
16 H.B. 142, to repeal the statute or to do anything to alter the
17 operation of the statute. That shows that the UNC Defendants
18 cannot provide relief. There's no redressability.

19 **THE COURT:** Does UNC have the authority to define
20 who's not going to be a trespasser for purposes of the
21 bathrooms and changing facilities, et cetera?

22 **MR. SURI:** To some extent, yes. But, firstly, that's
23 the power that's been preempted by H.B. 142. The very power to
24 regulate who can go into a particular restroom is the thing
25 that H.B. 142 takes away. I say to some extent, however,

1 because H.B. 142 includes an "except" clause. It says "except
2 in accordance with an act of the General Assembly." So to the
3 extent the University replicates some rule already established
4 by the General Assembly, for example, prohibiting a peeping or
5 indecent exposure or any other conduct that's independently
6 criminal, the University would have the authority in that
7 circumstance.

8 **THE COURT:** Has there been any interpretation of House
9 Bill 142, this language about Section 2, the regulation of
10 access? Has that been interpreted by any state court?

11 **MR. SURI:** I'm not aware of any interpretation by a
12 state court or any authoritative interpretation by the State.
13 The closest that we have I think is the Governor's statement
14 that people are not subject to prosecution as a result of going
15 into particular restrooms. But regardless of how that law --

16 **THE COURT:** Let me back up.

17 **MR. SURI:** Yes.

18 **THE COURT:** Except for the Governor's statement what?

19 **MR. SURI:** Except for the Governor's statement -- I
20 think this is paragraph 15 of the complaint -- that a
21 transgender person who uses the restroom consistent with his
22 gender identity is not subject to prosecution.

23 **THE COURT:** Is that part of an Executive Order or in
24 what capacity was that made?

25 **MR. SURI:** I'm not aware that that has any official

1 status. I'm just noting that that appears to be what the
2 complaint alleges is the Governor's position.

3 **THE COURT:** All right. Well, is the Governor bound by
4 that preemption provision?

5 **MR. SURI:** I don't know the answer to that. The
6 answer to that would turn on whether the Governor qualifies as
7 an agency or department within the meaning of H.B. 142 and I
8 don't think we've taken a position on whether he would or would
9 not. But even if you assume --

10 **THE COURT:** Is he a branch of government?

11 **MR. SURI:** He may well be.

12 **THE COURT:** Because that's one of the listed groups
13 that's preempted, right?

14 **MR. SURI:** Yes. But even if we accept that the
15 Governor has no authority to clarify the meaning of H.B. 142,
16 that doesn't change the fact that the University certainly
17 doesn't have the power to do anything about what H.B. 142
18 means.

19 There are a few different ways of looking at this
20 redressability issue. The first is suppose H.B. 142 were
21 enjoined, repealed, removed. Would that cure the uncertainty
22 that has allegedly led to this lawsuit? We submit the answer
23 would be no because with or without H.B. 142, the question
24 would still arise of whether the University or an agency of the
25 government prohibited the Plaintiffs from entering a particular

1 bathroom. Indeed, the repeal or invalidation of this statute
2 would seem to give the University or the agency more power to
3 exclude because now they can issue regulations saying "Don't
4 enter this particular bathroom." That's one way.

5 **THE COURT:** Is that argument one that applies equally
6 to all the Defendants?

7 **MR. SURI:** I think that argument would apply to
8 everyone else.

9 **THE COURT:** Okay.

10 **MR. SURI:** One additional point is that the University
11 itself -- putting aside the other defendants, the University
12 itself has no power to issue authoritative interpretations of
13 state law. We can debate whether the Attorney General or the
14 Governor has some power as part of the executive power to do
15 so, but the University, at the very least, certainly does not.
16 I think that covers --

17 **THE COURT:** When there's a trespass on a UNC campus,
18 who responds?

19 **MR. SURI:** It would be either the campus police or in
20 campuses where the University has entered into an agreement
21 with the local police, it would ultimately be the local police.

22 **THE COURT:** So let's assume it's campus police. Who
23 do they respond to? I mean, who would call them?

24 **MR. SURI:** It could be the person who witnesses the
25 trespass or it could be someone at the university who says,

1 "There's a trespasser. Please deal with the trespasser."

2 Now, let's posit, for the sake of argument, that the campus
3 police does everything on the instructions of the University
4 and the University tells the campus police exactly what to do.
5 We dispute that, but let's assume it to be true anyway. Even
6 then there would be no standing in this case because this case
7 is not about a challenge to the trespass laws. They could have
8 brought an as-applied challenge to the trespass laws. They
9 haven't done so.

10 They've instead challenged this jurisdictional provision,
11 H.B. 142, that says the power to regulate is vested in the
12 General Assembly rather than in everyone else; and any injuries
13 that flow from that simply are untraceable to the University,
14 aren't redressable by the University.

15 Further, in respect to the trespass laws, I think it's
16 worth emphasizing that one condition for application of the
17 trespass laws is that someone receive notice that he must stay
18 out of the place where he would be a trespasser. We think that
19 H.B. 142 denies the University the power to impose such an
20 exclusion in the first place. The University is preempted from
21 saying, "Stay out." Any command to stay out, if one exists,
22 must come straight from the General Assembly, not from the
23 University.

24 That covers what I have to say on standing. Unless the
25 Court has further questions, I'll turn to the merits.

1 **THE COURT:** So if a transgender student wishes to
2 use -- wishes to be housed in a dorm of the sex with which that
3 person identifies and use the showers of that dorm, what does
4 H.B. 142 allow or prohibit in that instance?

5 **MR. SURI:** H.B. 142 preempts the University's ability
6 to say, "We will discipline you or punish you or do anything to
7 you if you use those particular showers." It also preempts the
8 University from issuing a regulation that says entry into those
9 particular showers is validated and authorized.

10 That second part of my answer is of no relevance in this
11 case because the Plaintiffs have accepted in response to the
12 Legislative Intervenor's commandeering arguments that that's
13 not what they're asking for. They're not asking for the
14 Defendants to be ordered to make an affirmative policy saying,
15 "Yes, please go ahead and use these particular restrooms."

16 All they're contesting, it seems to me from that
17 concession, is that they don't want the Defendants imposing a
18 prohibition, but that's what H.B. 142 already prevents us from
19 doing -- already prevents the University from doing. There's
20 no additional redress that they could get from the University.

21 **THE COURT:** All right. Thank you. Anything further
22 you want to add?

23 **MR. SURI:** No, that's all I wish to say, unless you
24 have questions on that.

25 **THE COURT:** All right. Maybe later.

1 All right. I'll be glad to hear from the Attorney
2 General's office.

3 **MS. VYSOTSKAYA:** Yes, Your Honor. We have not briefed
4 the motion to dismiss because your order has allowed us to have
5 30 days after you decide a motion on our proposed consent
6 order, so we have not briefed the issue of jurisdiction and
7 would like to reserve the right to brief it later, if
8 necessary.

9 However -- and I don't know if Your Honor would like to
10 direct us to answer -- I could address some of the questions
11 that you had to the other side during an argument on the
12 consent decree portion of the proceedings after Plaintiffs have
13 an opportunity to respond to the arguments raised on the motion
14 to dismiss.

15 **THE COURT:** Okay. So you don't have any view on the
16 Defendant' positions?

17 **MS. VYSOTSKAYA:** We do not and would like to reserve
18 the right to do a full briefing, if necessary, if Your Honor
19 does not dismiss us as part of the consent decree proceedings.

20 **THE COURT:** All right. All right. Let me hear from
21 the Plaintiffs then.

22 **MR. STRANGIO:** Good morning, Your Honor. Thank you.

23 **THE COURT:** Good morning.

24 **MR. STRANGIO:** I want to start by responding a bit to
25 the Defendants' suggestion that H.B. 142 does not injure the

1 individual Plaintiffs and that they don't have standing to
2 bring this case, and I want to do that first in response to the
3 due process argument and also want to make some important
4 clarifications with respect to equal protection and the nature
5 of the injuries alleged there.

6 As to the very concrete injuries to Joaquín Carcaño and
7 Payton McGarry, the individual plaintiffs in this case, those
8 are injuries that are directly traceable to H.B. 142. Counsel
9 for the Intervenor-Defendants was talking about, for example,
10 trespass being a fact-specific inquiry. The injury here is
11 that for now over a year UNC will not let Joaquín Carcaño know
12 where he can go to the bathroom. As a result of that, the
13 injury operates in two ways.

14 **THE COURT:** Let me pause there for a moment. When
15 this -- when the action first got filed, the request from the
16 Plaintiffs was for a preliminary injunction. You asked me to
17 enjoin the enforcement of H.B. 2 and the reason was because
18 H.B. 2 upset the previous status quo ante, we would say in the
19 law, and at the time you told me that you did not dispute or
20 take issue with the labeling of restrooms, for example, as men
21 and women. I take it that's still your position, as I
22 understood your briefing; is that right?

23 **MR. STRANGIO:** That's correct, Your Honor.

24 **THE COURT:** All right. So before H.B. 2 was passed by
25 the General Assembly, the restrooms were labeled "Men" and

1 "Women." Then H.B. 2 came along and defined what that meant,
2 and it was that definition that I understood the Plaintiffs to
3 take issue with, and I entered a partial injunction as to three
4 of the Plaintiffs, and the request was to return the Plaintiffs
5 to the position they were in before H.B. 2 was passed --

6 **MR. STRANGIO:** That's correct.

7 **THE COURT:** -- which presumably was their
8 constitutionally protected position. That's what they wanted.
9 So now H.B. 142 -- I hesitate to use the House Bill numbers
10 because these are laws and so they're not really accurate at
11 this point. But H.B. 142 eliminates the definitional aspects
12 of H.B. 2 that seem to have caused the filing of the original
13 lawsuit and the injury to the Plaintiffs. So I'm a little bit
14 at a loss as to how returning the Plaintiffs to the position
15 they wanted to be in before now is an injury, whereas before it
16 was the desired state for relief.

17 **MR. STRANGIO:** Well, Your Honor, I think that it's the
18 same -- the same request. The Plaintiffs now have been injured
19 by H.B. 142. We don't believe that an injunction -- we don't
20 believe that H.B. 142 returns us to the status quo ante right
21 now. The only way that we can do that is through an injunction
22 enjoining H.B. 142 and the reason is --

23 **THE COURT:** Let's take it piece by piece because
24 they're different pieces of H.B. 142. Let's talk about the
25 portion of H.B. 142 that repeals H.B. 2. So that's Section 1,

1 I believe.

2 **MR. STRANGIO:** That's Section 1, yes.

3 **THE COURT:** Are you injured by Section 1?

4 **MR. STRANGIO:** No, Your Honor, we don't take issue
5 with Section 1. We have the contingent claims if Section 1 is
6 struck down and H.B. 2 springs back to life. The focus of the
7 challenge is on Section 2 of H.B. 142, which is the provision
8 with respect to the regulation of bathrooms. So if we focus on
9 that first --

10 **THE COURT:** All right. So Section 2, according to the
11 University, is interpreted to mean that they can't say one way
12 or the other. They're returning people back to however it was
13 without anybody speaking one way or the other about regulating
14 access to bathrooms.

15 Do you agree with that interpretation, that that's what
16 that does?

17 **MR. STRANGIO:** I don't agree with that interpretation
18 or I certainly -- I at least don't agree with that
19 interpretation as it's been operating in the real world, which
20 is part of why UNC is responsible to the injuries of our
21 Plaintiffs.

22 **THE COURT:** Well, let's start -- let's stick with the
23 statute right now.

24 **MR. STRANGIO:** So the statute -- no, I don't agree
25 with that.

1 **THE COURT:** You've made a facial challenge to the
2 statute, right?

3 **MR. STRANGIO:** Yes, Your Honor.

4 **THE COURT:** Okay. So I need to stick with the statute
5 first. So tell me why Section 2 causes injury.

6 **MR. STRANGIO:** Section 2 causes injury to -- focusing
7 on the individual transgender plaintiffs and the members of the
8 ACLU of North Carolina, Section 2 prevents them from having any
9 authorization to enter a restroom.

10 **THE COURT:** Why is that?

11 **MR. STRANGIO:** Because they --

12 **THE COURT:** I -- but before H.B. 2 was passed, were
13 transgender individuals allowed to enter the restroom that they
14 identified with?

15 **MR. STRANGIO:** Certainly they were allowed to
16 negotiate access. For example, Joaquín Carcaño was using the
17 men's restroom with the permission of UNC. UNC had a
18 nondiscrimination policy that allowed transgender
19 individuals -- all of our clients have alleged this. They were
20 using facilities consistent with their gender identity prior to
21 H.B. 2, prior to H.B. 142.

22 **THE COURT:** I thought at the time of the preliminary
23 injunction hearing the Plaintiffs' position was that they had a
24 right to use the facilities with which they identified and that
25 everything was working out -- I hesitate to use the word

1 "fine." But that there was no need for H.B. 2 to redefine, if
2 you will, according to the Plaintiffs, access to these
3 facilities; and that if -- if the Court were to strike H.B. 2,
4 Plaintiffs could go back to the way things were. Even the
5 Governor's lawyer at that point, I believe, told me, "Well,
6 that's kind of the way things were. Nobody knew and everything
7 seemed to be fine."

8 **MR. STRANGIO:** Yes. And that's our position.

9 **THE COURT:** So what I'm having trouble with -- if
10 that's what we call the status quo ante before H.B. 2, then how
11 is that an injury to the Plaintiffs?

12 **MR. STRANGIO:** Because the injury is the operation of
13 H.B. 142. H.B. 142 is the reason we can't return to the status
14 quo ante.

15 **THE COURT:** Explain that to me because I'm having a
16 hard time following your line of reasoning.

17 **MR. STRANGIO:** H.B. 142 --

18 **THE COURT:** H.B. -- let me offer a proposition. Does
19 H.B. 142 prohibit the various groups listed there from defining
20 access to restrooms?

21 **MR. STRANGIO:** So read literally, I think H.B. 142
22 prohibits every single aspect of regulation with respect to
23 restrooms. So it would prohibit, read literally, the
24 separation of men's and women's restrooms. I don't see how you
25 can read H.B. 142 and regulate access to restrooms at all.

1 I think -- you know, looking at the context, though, and
2 how H.B. 142 actually operates in the state of North Carolina,
3 the bathrooms are being maintained for men and women, and we're
4 not challenging that. We're just pointing that out for
5 purposes of showing what's really going on here. What's really
6 going on here is that this is a law that is designed to either
7 bar transgender people from using the restrooms --

8 **THE COURT:** How does it do that?

9 **MR. STRANGIO:** It does that, you know, in a number of
10 ways. By first creating a vacuum where there is --

11 **THE COURT:** What's the vacuum?

12 **MR. STRANGIO:** The vacuum is the fact that it refers
13 to an act of the General Assembly when there is no act of the
14 General Assembly, so an individual --

15 **THE COURT:** Wasn't the vacuum there before H.B. 2?

16 **MR. STRANGIO:** Well, the vacuum was there before H.B.
17 2, but we have to acknowledge the context of what's going on
18 here. The status quo ante was transgender individuals -- as
19 former Governor McCrory's counsel admitted, people were going
20 about their lives. They were navigating access to restroom
21 use. Our clients had. Their ability to obtain the
22 authorization -- as Your Honor recognized in the preliminary
23 injunction decision, that H.B. 2 operated in conjunction with
24 the trespass statute to define who has authorization. That is
25 still true. Authorization, as Defendants' counsel agreed, is a

1 fact-specific question.

2 Right now UNC is throwing up its hands and saying, "We
3 can't tell you, Joaquín Carcaño, whether you can use the
4 bathroom without facing penalty." The most they've offered to
5 the Court is that the Court must assume that they won't be
6 disciplined, with no citation to any --

7 **THE COURT:** I thought the lawyer told me something
8 more than that and that was that we can't prohibit you from
9 using the bathroom of your choice.

10 **MR. STRANGIO:** They said -- what I --

11 **THE COURT:** "If you identify as a transgender, then
12 you can use the bathroom that you wish because we can't
13 regulate that. So we don't" -- as I understood it, "We don't
14 have to tell you which one to use. You make your choice and we
15 can't do -- we can't send the police out after you, if you
16 will."

17 Did I understand your argument correctly?

18 **MR. SURI:** Yes, Your Honor.

19 **MR. STRANGIO:** So if it's UNC's position that
20 transgender individuals are authorized and have University
21 permission to use the restroom, then that's different than
22 what's been happening to our individual clients because this
23 seems like a different representation in court than one that's
24 being made outside of court for purposes of letting individual
25 transgender people know whether or not they have authorization

1 to enter the bathroom for purposes of the trespass statute, and
2 we submit that that is an injury.

3 You know, going -- taking a step back and sort of
4 addressing the question of standing and redressability, the
5 injury is two-fold. First, it's the fact that our individual
6 clients have altered their behavior as a result of this. They
7 have sought clarification from the Defendants about whether or
8 not they have authorization to enter the restrooms. They have
9 not received that. They have restricted their restroom use.

10 **THE COURT:** So let's assume for a minute that I grant
11 the relief you ask for. Let's assume that I strike down that
12 provision in Section 2 and assume that I find that the repeal
13 is not severable from that, so I strike everything down. So
14 H.B. 2 goes back into effect; is that right?

15 **MR. STRANGIO:** Yes, Your Honor.

16 **THE COURT:** Let's assume I strike it down. Total win.
17 You get everything you ask for. Then where will your clients
18 be with respect to access to these facilities and how is that
19 different from where they are at the present?

20 **MR. STRANGIO:** With respect to our individual clients
21 and allegations of the complaint, you know, two things. First,
22 you know, with respect to Joaquín Carcaño, he was using, with
23 the permission of UNC and pursuant to their nondiscrimination
24 policy, restrooms consistent with his gender identity. So he
25 would be back to where he was before.

1 **THE COURT:** Why can't he do that now?

2 **MR. STRANGIO:** He can't do that now because he -- for
3 two reasons. One, he has, understandably, in light of H.B. 2
4 and H.B. 142, concerns about whether he has authorization and
5 every time --

6 **THE COURT:** Wait a minute. Why did you say
7 "understandably"? H.B. 2 has been repealed. The one law that
8 told him that he couldn't is now off the books and it's been
9 replaced by one, as I understand it, that says that the
10 University is not going to get involved in that, it's not going
11 to regulate it.

12 **MR. STRANGIO:** Well, they are regulating access with
13 respect to everyone but transgender people is what I'm
14 understanding and maybe, perhaps, they're taking a different
15 position. But they are -- he is seeking authorization and
16 being told he cannot receive authorization to enter the
17 restroom, and because of that he has to fear that there will be
18 consequences, and that's certainly true --

19 **THE COURT:** Are they -- is the University telling him,
20 "No, you can't use it" or are they saying, "We can't tell you
21 one way or the other"?

22 **MR. STRANGIO:** The latter. They're saying that they
23 can't tell you -- we can't tell you one way or another. You
24 know, for purposes of the due process in this claim, you know,
25 we think that this constitutes an injury. The concern about

1 redressability, well, are we returning to the status quo ante
2 and at that point were the -- were the client -- were the
3 individual plaintiffs whole? Were they able to do -- use the
4 restroom consistent with their gender identity? As our clients
5 have alleged, they were. I think that --

6 **THE COURT:** At what point in the status quo ante was
7 your client entitled to have the University respond as to what
8 restrooms he could use?

9 **MR. STRANGIO:** Well, first I want to say that the
10 injury alleged isn't the fact that they're not responding. The
11 injury is that as a result of the operation of H.B. 142 and the
12 fact that he has -- this Court has recognized that trespass
13 applies to whether men and women go into the, you know, quote
14 unquote, proper restrooms, that he is understanding -- he, as a
15 result of the actions that have transpired over the last two
16 years, feels differently about the importance of seeking
17 authorization and that's what he's alleging --

18 **THE COURT:** But you're not challenging the labeling of
19 the facilities as men's and women's, right?

20 **MR. STRANGIO:** No, we're not, Your Honor. We think
21 that --

22 **THE COURT:** And your clients can choose which one they
23 identify with, right?

24 **MR. STRANGIO:** Well, they can choose for sure, yes.

25 **THE COURT:** And if they choose which one they identify

1 with under current law and use the facility that is consistent
2 with what they identify with, is there any part of the law that
3 says he can't do that; that there's notice that would be a
4 trespass?

5 **MR. STRANGIO:** We think that -- two things. First is
6 the many statements made by, for example, the
7 Defendant-Intervenors that this maintains H.B. 2 and that
8 representation that the status quo ante was that people of --

9 **THE COURT:** Well, I can't give that legal effect,
10 though. I mean, they're -- these are people making statements
11 to the press. I mean, I apply the law, so I'm looking at the
12 statute. So if various people want to say it means one
13 thing -- I mean, they may say that your clients are barred from
14 using the restroom because of the -- some statute that deals
15 with swimming pools or something. I mean, they would be wrong,
16 but I'm not going to give that much weight or any weight. So
17 let's focus on the statute.

18 **MR. STRANGIO:** Well, focusing -- focusing on the
19 statute and focusing on the context, our individual clients
20 have alleged that they cannot use the restroom and the consent
21 decree -- so if this Court finds standing, the consent decree
22 is an opportunity to --

23 **THE COURT:** Let's get the standing issue resolved
24 first, because if I don't find standing, then there may be an
25 issue about the consent decree.

1 **MR. STRANGIO:** I think it's also helpful to look at
2 the equal protection claim because that's another part of this,
3 which I don't agree with Defendant -- the
4 Intervenor-Defendants' counsel that this is not a -- in a sense
5 a discrimination. I think the standard that this Court applies
6 is the standard that the Supreme Court announced in *Arlington*
7 *Heights* looking at whether or not a legislative action is --
8 both has sort of motivating factors to impact a particular
9 group.

10 **THE COURT:** Are you now talking about Section 3?

11 **MR. STRANGIO:** Your Honor, I'm talking about both
12 sections, about Section 2 and Section 3, because this is a --
13 you know, it has been alleged by our -- in the Fourth Amended
14 Complaint that the injury to transgender individuals is both
15 the due process injury and the equal protection injury; that
16 transgender individuals have been singled out. And the
17 motivation behind the law was, you know, the exclusion of or
18 the confusion about transgender individuals using restrooms at
19 all whatsoever.

20 The injury for standing purposes -- so we can look at the
21 merits, *Arlington Heights* test -- about whether or not that
22 test is met, but equal -- a violation of equal protection is an
23 injury in fact for Article III purposes, and that's what's been
24 alleged both with respect to Section 3 of the law and with
25 respect to Section 2.

1 And going to the redressability piece, I think that
2 *Northeast Chapter*, as well as the affirmative action cases that
3 are -- perhaps are instructive here as well. Those cases stand
4 for the proposition that, yes, there may be other things in the
5 way of whole relief to an individual. In *Arlington Heights*,
6 for example, the developing -- there were lots of contingencies
7 in place, but it was the local zoning restriction that was the
8 barrier being challenged. In this case, H.B. 142 is the
9 barrier being challenged. It is the source of the injury and
10 taking it away --

11 **THE COURT:** You need to be more specific. What part
12 of H.B. 142?

13 **MR. STRANGIO:** Both H.B. -- both Section 2 and
14 Section 3 of H.B. 142 single out LGBT people.

15 **THE COURT:** How does Section 2 single out LGBT people?

16 **MR. STRANGIO:** I think, for example, that Section 2 of
17 H.B. 142, the provision about restroom access, and the -- you
18 know, read literally, that it -- it only -- it would prohibit
19 any regulation whatsoever, but we know that that's not
20 happening.

21 **THE COURT:** Well, that -- does that prohibit the
22 University of North Carolina from applying H.B. 2 locally on
23 its campuses?

24 **MR. STRANGIO:** Yes, Your Honor, I think read
25 literally, but H.B. 2 isn't the source of the injury challenged

1 here.

2 **THE COURT:** Well, no, that's not the point. The point
3 is that -- is to define what it means when it says "are
4 preempted from regulation of access." So -- I mean, some of
5 the cases you sent me as supplemental authorities, at least one
6 of them, was a group of folks who were interested in privacy in
7 restrooms and so there's more than one side to this issue.
8 There are folks who oppose access to multi-use facilities
9 unless it was anatomical, which raises the H.B. 2 issue I guess
10 again. So would Section 2 prohibit regulation in accordance
11 with that side of the argument?

12 **MR. STRANGIO:** Read literally, I think that it
13 would -- it prohibits regulation of access. In operation, I --
14 I don't understand how we could assume that regulation of
15 access to restrooms only means regulation of access for
16 transgender people. Right now every state agency, as far as
17 I'm aware, of the University of North Carolina is maintaining
18 men's and women's facilities, which is a regulation of access
19 into those facilities; and the only way that the regulation of
20 access in H.B. 142 is understood is to be about transgender
21 individuals. That seems like a context that would never have
22 existed before H.B. 2, that you would talk about regulation of
23 access to restrooms and the only thing that we would be
24 referring to would be where transgender individuals can go to
25 the restroom.

1 So I think that it's important to look at cases like *City*
2 *of Los Angeles versus Patel* that remind us that the proper
3 inquiry is the people for whom the laws are restriction and
4 that is transgender people. Everyone else is going about their
5 lives, going to the bathroom as they always have because
6 everyone is regulating restroom access inconsistent with H.B.
7 142, but that is illustrative of the fact H.B. --

8 **THE COURT:** But how does H.B. 142 restrict the
9 Plaintiffs access to the restrooms of their choice?

10 **MR. STRANGIO:** Your Honor, the allegations -- so one
11 example is that since -- as we've alleged in the complaint,
12 paragraph 76, that since H.B. 142's passage and the lifting of
13 the preliminary injunction against the enforcement of H.B. 2 --
14 this is with respect to Mr. Carcaño -- the University of North
15 Carolina has refused to state whether Mr. Carcaño is permitted
16 to use the restroom and so he is injured by the fact that he
17 cannot go to the bathroom at work. He cannot -- that is an
18 injury and the source of that injury is H.B. 142.

19 **THE COURT:** Why can't he use the restroom of his
20 choice? What's prohibiting him from doing that?

21 **MR. STRANGIO:** The risk of adverse consequences.

22 **THE COURT:** What adverse consequences?

23 **MR. STRANGIO:** Possible arrest for trespass.

24 **THE COURT:** For trespass?

25 **MR. STRANGIO:** For -- you know, for not having

1 authorization. They will not provide him with authorization
2 and they have the authority to do so.

3 **THE COURT:** But if they -- if the University can't
4 regulate access, how would it -- how would it charge him with
5 trespass?

6 **MR. STRANGIO:** Well, the -- they could say that -- you
7 know, that he is not authorized to be in the bathroom in a
8 fact-specific inquiry or someone else could and they haven't
9 given him the ability to have the authorization at his
10 disposal. The authorization is the source of the injury, the
11 fact that he cannot go about his life without that risk.

12 And if you look at cases like *Babbitt* and *Susan B. Anthony*,
13 for standing purposes an individual need not face arrest in
14 order to determine what the law means. And he has gone out of
15 his way, as has counsel, to try to just make sure that he has
16 authorization to enter the restrooms so that he doesn't have to
17 fear --

18 **THE COURT:** Is there any realistic likelihood that
19 Mr. Carcaño is going to face arrest for using the restroom of
20 his choice when the University's position is that they're not
21 going to regulate access to the bathrooms?

22 **MR. STRANGIO:** Well, they have represented certain
23 things in court today, but the University is regulating access
24 to the restroom insofar as they're maintaining separate
25 restrooms for men and women.

1 **THE COURT:** But you didn't take any issue with that.

2 **MR. STRANGIO:** We aren't challenging that, but we
3 think that that's instructive. They're taking inconsistent
4 positions with respect to their authority under H.B. 142.

5 **THE COURT:** How can you challenge -- I'm struggling.
6 How do you criticize them for something that you don't
7 challenge?

8 **MR. STRANGIO:** Because we're not saying it's a source
9 of injury. We're saying it's evidence that they're not
10 following the law in the way that they are suggesting they are.

11 **THE COURT:** So they need to take down all the signs?

12 **MR. STRANGIO:** To be consistent with H.B. 142, read
13 literally. We're not challenging that, but the fact that they
14 haven't -- the fact that they're -- they cannot regulate access
15 to restrooms if H.B. 142 says what everyone is claiming that it
16 means. It's unclear to us how they are doing the regulation
17 that they are doing for everyone else but transgender people
18 and that's the source of the injury, is through the operation
19 of the law they're maintaining this -- they're throwing up
20 their hands and saying, "Good luck guessing. We're not going
21 to tell you which restroom to use. We are going to regulate
22 access in every single other way."

23 I think actually the City of Charlotte's ordinances are
24 instructive here to sort of point out the way in which the law
25 is operating in a nonsensical manner and is designed

1 exclusively to be about transgender individuals, in violation
2 of both due process and of equal protection. Charlotte has a
3 prohibition on sex discrimination, so not talking about the
4 pieces of the Charlotte ordinance that were repealed with
5 respect to sexual orientation and gender. They had a
6 prohibition on sex discrimination of public accommodations.
7 Section 3 of H.B. 142 does not preempt existing
8 nondiscrimination ordinances. It only prospectively preempts.
9 But it does prohibit regulation of access to restrooms.

10 So here's how Charlotte's ordinance is set up, saying it
11 shall be unlawful to deny a person because of sex the full and
12 equal enjoyment of the goods, services, facilities of public
13 accommodation. So a straightforward prohibition on the basis
14 of sex. And then it has a separate section that says that this
15 shall not apply to restrooms, showers, bathhouses, and similar
16 facilities and has -- you know, recognizing that wholesale
17 prohibition on sex discrimination, as this Court recognized,
18 would raise questions about the separation altogether with
19 respect to restrooms.

20 So that piece seems to be preempted by Section 2 of H.B.
21 142, but nobody is interpreting it that way. Nobody is taking
22 down the signs across the state of North Carolina. Nor are we
23 suggesting that they should. We point it out merely to say as
24 a factual matter --

25 **THE COURT:** But you're criticizing UNC for not doing

1 it, right?

2 **MR. STRANGIO:** It depends what you mean by criticism,
3 Your Honor. If you -- if you mean criticizing so that we can
4 highlight the extent to which their arguments are internally
5 inconsistent, then yes. If you mean criticizing as inform the
6 basis of our constitutional injury or our statutory injury,
7 then no. It's more that it highlights that. Read literally,
8 H.B. 142 cannot be squared with how things are operating on the
9 ground, and that is the source of both the injury under due
10 process and the injury under equal protection.

11 **THE COURT:** So can Section 2 be read consistent with
12 the Constitution?

13 **MR. STRANGIO:** We think, Your Honor, that the consent
14 decree accomplishes that.

15 **THE COURT:** No, I'm not interested -- I'm not
16 interested in the consent decree right now. I'm interested in
17 the statute. Can the -- I mean, isn't there a proposition that
18 if a statute can be interpreted constitutionally the Court
19 should endeavor to interpret it constitutionally?

20 **MR. STRANGIO:** Yes, Your Honor. I think --

21 **THE COURT:** And so can -- can the statute be
22 interpreted constitutionally?

23 **MR. STRANGIO:** Not without clarification from -- from
24 the Court. Otherwise, we're left in the same place we are now,
25 where the injuries are being maintained by the inconsistent

1 operation and enforcement of H.B. 142. But, yes, consistent
2 with the Constitution, H.B. 142 could be read to prohibit --
3 and enforced in such a way so as to explicitly prohibit H.B.
4 142 itself from being the source of the discrimination and lack
5 of authorization with respect to entry into the restroom and
6 locker room facilities, as well as the removal of the denial of
7 equal protection. It could. It is not now in any way being
8 enforced or the operation is not --

9 **THE COURT:** So your clients want to have the full
10 protections of everyone else, right?

11 **MR. STRANGIO:** Yes, Your Honor.

12 **THE COURT:** And they deserve to have that. And -- so
13 the question is: If your clients identify as a certain sex, a
14 certain gender and they want to use the restroom, why can't
15 they then have the full protections everybody else would have
16 and use the restroom of their choice under your theory of the
17 case?

18 **MR. STRANGIO:** The theory of the case is that H.B. 142
19 is a bar to them.

20 **THE COURT:** Forget H.B. 142.

21 **MR. STRANGIO:** Oh, forget H.B. 142.

22 **THE COURT:** So you have a transgender male who wants
23 to use the men's room. It says "Men's," identifies as a male,
24 wants to use the men's room. Is there anything in H.B. 142
25 that says he can't go in there?

1 **MR. STRANGIO:** The -- on the -- read literally --

2 **THE COURT:** I'm not asking if they go ask permission
3 and they want an explanation and they want it in writing or
4 they want some other assurance. Is there anything in 142 that
5 says you cannot do that, which was the problem with H.B. 2
6 because it said you cannot do that? Is there anything in 142
7 that says you cannot do that?

8 **MR. STRANGIO:** Read literally, Your Honor, no, I don't
9 think there's anything in H.B. 142 that says you cannot do
10 that.

11 I will just remind the Court that there are the nominal
12 damages claims with respect to H.B. 2 and so we can get to
13 those. There is nothing in the literal language. I do think
14 the reality of what is happening to our clients, the injuries
15 alleged, is that they are being injured by the operation of
16 H.B. 142 in practice; that without an order from this Court
17 that the Defendants are going to go back to doing what they
18 have been doing, which is to prohibit de facto individuals from
19 getting authorization that they need to not be injured insofar
20 as they are --

21 **THE COURT:** But -- but -- you put a lot into that
22 sentence, "de facto" and "authorization that they need." As I
23 understand, they're free to use the restrooms currently for the
24 gender that they identify with.

25 **MR. STRANGIO:** Well, it depends on what you mean by

1 "free," Your Honor. Going back to the standing question, the
2 injury is that they -- they are not free without injury to use
3 the restrooms that they are -- that they identify with. They
4 may be free in some sense that they -- you know, I may be free
5 to go walk into the women's room now.

6 **THE COURT:** So in any state that didn't have the
7 history that North Carolina has with H.B. 2, don't they face
8 this same problem? That is, if they have restrooms labeled
9 "Men's" and "Women's" and a transgender individual wants to use
10 a restroom, they go to whatever authority and ask for
11 permission, and they say, "I'm not going to, you know, say one
12 way or the other, but I'm not going to regulate you," aren't
13 they in the same position that folks in North Carolina would
14 be?

15 **MR. STRANGIO:** I don't think they are and I think
16 going to the -- to the legal question about whether or not they
17 have standing to challenge this ban, which is what -- what they
18 brought before this Court, I do -- I want to make one point
19 about the redressability and the nature of the injury.

20 **THE COURT:** Yeah, but you're not answering my
21 question. I'm trying to get to the injury question. Does this
22 mean people across the nation are injured by "Men's" and
23 "Women's" signs unless they get permission?

24 **MR. STRANGIO:** No, Your Honor, that is not our -- that
25 is not our contention. Our contention is specific to

1 North Carolina, to the operation of this law; that it's not a
2 generalized injury about not being able to have authorization
3 in every single context.

4 It's that there are individual transgender people, Joaquín
5 and the other plaintiffs, who managed their lives. They
6 weren't running into court before H.B. 2. The injury is
7 traceable and a product of H.B. 142.

8 No, this is not an injury that every transgender person has
9 across the country when they can't find someone to tell them
10 where they can go to the restroom. This is an injury that is a
11 product of H.B. 142 and that is redressable by H.B. 142 being
12 struck down. The fact that there may be other uncertainties in
13 the world -- the Defendants have reframed the nature of the
14 claim. We're not seeking to eliminate every uncertainty.
15 We're seeking to eliminate the injury caused by H.B. 142.

16 **THE COURT:** What happens if I strike everything down
17 and Mr. Carcaño wants to use the restroom at UNC? Is he
18 injured?

19 **MR. STRANGIO:** Is he injured by wanting to use the
20 restroom, Your Honor?

21 **THE COURT:** No. I'm going to strike everything down,
22 complete relief for Plaintiffs.

23 **MR. STRANGIO:** Complete relief I think --

24 **THE COURT:** So if I give complete relief and
25 Mr. Carcaño goes back to UNC and says, "I've been here before.

1 You told me you wouldn't tell me one way or the other. Now I'm
2 asking can I use the men's room" -- all right. I don't know
3 what the answer would be, but if it's the same answer, that is,
4 "We're not going to regulate it one way or the other," is he
5 now injured?

6 **MR. STRANGIO:** Well, I think with respect to UNC
7 specifically, that their position has always been their
8 nondiscrimination law in the past had allowed people to use the
9 restrooms, and that was the basis for him having that
10 authorization and him being able to negotiate that.

11 If we sort of eliminate the two years that have passed and
12 take away -- strike down the law, is Mr. Carcaño injured when
13 he can't get permission to use the restroom? I think that
14 that's an unlikely factual scenario and that his employer would
15 negotiate in the fact-specific context in the way that they had
16 been prior.

17 If it's simply -- if it operates to exclude him from the
18 restroom, if there's -- you know, based on the facts, then,
19 yes, that would be an injury. I don't think the source of the
20 injury is the uncertainty. The source of the injury in that
21 context would be the exclusion fact-specific to that. In
22 the -- as things stand now, the relief that Plaintiffs seek is
23 the removal of H.B. 142. H.B. 142 is the barrier in New
24 Hanover County. It's the barrier at UNC. It's the barrier
25 that --

1 **THE COURT:** Well, it's a barrier in New Hanover County
2 because some administrator says, "I think it's a barrier,"
3 right?

4 **MR. STRANGIO:** But -- you know, then if that's -- if
5 the position of the Defendants is that they can't do that,
6 then, you know, nothing -- nothing is stopping them from doing
7 it because there's -- this law is only being enforced in such a
8 way as to -- as to transgender individuals. This is a law that
9 everyone understands to be about transgender individuals.
10 Either throwing up your hands, as UNC has done, to say, "We
11 won't tell you, but good luck," or using it as a ban
12 altogether, as New Hanover has done -- and that's the relief
13 that Plaintiffs seek, the removal of H.B. 142. That is the
14 barrier. That is the source of the injury.

15 And going back quickly, if I could, just to the equal
16 protection arguments with respect to H.B. 142, I want to
17 clarify again that *Arlington Heights* is the proper standard;
18 and that under *Arlington Heights*, the factors that this Court
19 can look at are the impact of the law, the historical
20 background, the sequence, the departure from normal procedures,
21 all of which have been alleged in the complaint. And -- and
22 with respect to transgender individuals seeking the restroom
23 and with respect to LGBT individuals seeking nondiscrimination
24 protections, the allegations show that there is an injury.

25 Now, whether or not when you get to the tailoring of the

1 law -- and we contend that in *Arlington Heights* scrutiny is
2 proper. They can make a claim that there was a purpose behind
3 this law, that it survives heightened scrutiny; but on a motion
4 to dismiss, they've offered none of that. And heightened
5 scrutiny, it's their burden.

6 And so our position is that the injury flows from both the
7 way in which H.B. 142 has been operating in reality, as we've
8 discussed, as well as from the denial of equal protection,
9 which is itself an Article III injury. And the Supreme Court
10 and the Fourth Circuit have been clear on that. We put that
11 into the briefing.

12 And so I -- we can get to the nominal damages. I don't
13 know if Your Honor wants to talk about that.

14 **THE COURT:** I want to hear from you about your
15 political process -- what the Defendants call political process
16 claim. That's the Section 3.

17 **MR. STRANGIO:** Yeah, with respect -- with respect to
18 the political process claim, which is also an equal protection
19 argument -- and this is -- is a straightforward, you know,
20 restriction, subjecting individuals to a different political
21 process than others and boxing LGBT individuals out of the
22 political process in a particular way. Now --

23 **THE COURT:** Does it box everybody out or does it only
24 box one side out?

25 **MR. STRANGIO:** It -- with respect to Section 3 --

1 **THE COURT:** Yeah.

2 **MR. STRANGIO:** -- with the nondiscrimination? It is
3 specific to certain classes of people that don't already have a
4 local protection since it's prospective only. So under *Hunter*
5 *v. Erickson* and *Romer*, I think it is specific to people based
6 on sexual orientation and gender identity; and that by virtue
7 of boxing out people from the political process, that is
8 another injury for purposes of Article III if we're looking at
9 standing and under 12(b)(6), you know, stating a claim as to a
10 violation of equal protection.

11 **THE COURT:** Does the State have the authority to
12 decide what issues it wants to resolve on a statewide basis
13 versus a local basis?

14 **MR. STRANGIO:** The State generally has the authority
15 to do that, but not in a discriminatory manner, not in a manner
16 that violates equal protection.

17 **THE COURT:** So how does Section 3 -- how is that
18 discriminatory?

19 **MR. STRANGIO:** Well, section -- so there's -- there's
20 two parts to the argument. The one that we were just
21 discussing about *Arlington Heights*, which is separate and apart
22 from the political process equal protection argument, that --
23 the *Arlington Heights* factor is whether or not there's both the
24 motivating impact behind the law and -- the motivating intent,
25 as well as the impact, are targeting a group of people. So

1 there's two parts to this. So there's the *Arlington Heights*
2 equal protection violation and then a separate piece about the
3 political process, which is a separate equal protection
4 violation, both of which are sufficient for purposes of
5 standing; and the injury is the denial itself.

6 As to the political process, it is specific to
7 ordinances -- to regulations prospectively. So it sets back
8 where things are and groups of people that are boxed out
9 include LGBT people who are now subjected to a different level
10 of legislative process in order to get the protections that
11 they -- that they need. Now, it doesn't -- the law doesn't say
12 that it has to only be one group of people. So someone else
13 may come in and say that they were denied equal protection.

14 But going back to both -- the *Arlington Heights* piece, the
15 purpose behind this law and the way in which it boxes people
16 out of the political process is very much specific to LGBT
17 people. The context is that Charlotte passes the ordinance.
18 Everyone rushes in to the Special Session saying that this is a
19 crisis and then that is maintained specifically with H.B. 142,
20 Section 3. And so it's both the *Arlington Heights*
21 discrimination in violation of equal protection, in violation
22 of equal protection by boxing a specific group of people out of
23 the political process.

24 If I could just add one final thing, Your Honor, with
25 respect to the arguments raised by the Defendants that multiple

1 groups are boxed out of the political process in the same way.
2 I don't think it's -- everyone is because you have lots of
3 ordinances that are currently in place that provide different
4 levels of protection than exist at the state level. So this
5 isn't a uniformity issue.

6 This is about prospectively stopping people from getting
7 new protections and that is analogous to the situation in
8 *Hunter v. Erickson* where it wasn't just race, for example.
9 That was the City of Akron Housing Ordinance context. It was
10 race, religion, national origin. Multiple factors were put on
11 a different process and the court found that that was a
12 violation of equal protection because it subjected people on
13 the basis of race of a different -- to a different process than
14 others.

15 And we think that is plainly analogous here and that both
16 for the discussion as to the operation of H.B. 142 and the
17 injuries flowing from it under due process and then the many
18 allegations of how this is a violation as well of equal
19 protection -- and we haven't discussed the statutory claims.
20 They're analogous both with respect to H.B. 142 and H.B. 2. We
21 think that there are ample allegations to find both standing
22 and that the Plaintiffs have stated a claim under the various
23 theories.

24 **THE COURT:** All right.

25 **MR. STRANGIO:** I'll be happy to turn it over to -- do

1 you have any other questions?

2 **THE COURT:** I do not. Thank you very much.

3 Anybody else want to be heard from the Plaintiffs' side?

4 All right. Yes, Mr. Suri.

5 **MR. SURI:** Thank you, Judge Schroeder.

6 I just wish to emphasize one point about prohibition versus
7 authorization. The University has said that under H.B. 142 it
8 is preempted from forbidding transgender people from accessing
9 restrooms consistent with their gender identity. Now we hear
10 from counsel that that's not enough; the source of the injury
11 is beyond this not forbidding; the University needs to give a
12 kind of permission slip affirmatively authorizing access to the
13 restrooms.

14 I think there are four problems with that theory of injury
15 traceable to the University. The first is in the response to
16 the anti-commandeering argument they seem to disclaim any
17 request for an affirmative authorization. All they want is for
18 H.B. 142 to be invalidated.

19 Secondly, the general rule is you don't need affirmative
20 authorization to do what you want to do. It's up to the
21 government to prohibit you from doing something, and if it
22 doesn't do so, the private citizen doesn't need preclearance
23 from the government to engage in whatever conduct he wishes to
24 engage.

25 Third, the trespass statute works the same way. The

1 trespass statute doesn't say it's a trespass to go somewhere
2 where you don't have authorization. It says it's trespass to
3 go somewhere where there's either a notice posted saying "Keep
4 Out" or the owner has said, "Get out." And the University has
5 made it clear that H.B. 142 preempts it from doing that very
6 thing.

7 The final point is, even if you disagree with me on all of
8 those points, the point still stands that the University is not
9 responsible for the injuries in this case because it didn't
10 enact H.B. 142. We've heard that there's been a barrier put up
11 that creates a lack of assurance as to whether the Plaintiff
12 can use a particular restroom, but the University did not put
13 up that barrier. To the contrary, the University has had a
14 longstanding policy prohibiting discrimination against
15 transgender individuals. The legislature has put up this
16 alleged barrier. So the injury, if one exists at all, it's
17 traceable to the State, not the University.

18 **THE COURT:** All right. Mr. Schwartz.

19 **MR. SCHWARTZ:** Your Honor, it struck me that
20 Plaintiffs' argument was largely an effort to drag this case
21 out of the world of considering justiciability into the world
22 considering the merits.

23 The Plaintiffs kept on emphasizing the *Arlington Heights*
24 factors. The Plaintiffs kept on trying to talk about the
25 consent decree, but none of that matters. The *Arlington*

1 *Heights* factors go purely to the merits; and if you don't have
2 standing, then categorically the Court cannot get to the
3 merits.

4 Similarly with the consent decree. The consent decree
5 is -- it's an act of this Court's jurisdiction and its exercise
6 of judicial power, which is *ultra vires* if the Court doesn't
7 have jurisdiction in the first place.

8 So we need to talk about what exactly the injuries are the
9 Plaintiffs are alleging. As for uncertainty, as far as I could
10 tell, the Plaintiffs clarified that the uncertainty that
11 they're complaining about is their inability to get essentially
12 a permission slip in advance. But as my colleague representing
13 UNC Defendants just pointed out, ordinarily preclearance isn't
14 the standard; and as the Supreme Court has indicated, for
15 example, in the *National Park Hospitality* case, you can always
16 wish for additional clarification from the government about
17 your legal rights, but that doesn't get you into court.

18 Plaintiffs might want verbal permission. They might want a
19 written permission slip. They might want -- they might want a
20 framed -- a framed plaque saying that Mr. Carcaño can go into a
21 restroom, but their -- but their wish for additional --
22 additional steps of clarity, that's not enough to create a
23 justiciable injury.

24 The second thing the Plaintiffs address on -- the second
25 aspect of Plaintiffs' injury -- alleged injury that Plaintiffs

1 addressed just now is the -- has to do with the political
2 process. The Plaintiffs have conceded now that the State has
3 authority to decide what to do statewide and what to allow to
4 happen locally. Okay. If the State has that -- has that
5 authority and the Plaintiffs don't have a legal right to demand
6 that legislation happen at a particular -- and in a particular
7 state forum, that's it. No justiciable claim on the political
8 process theory.

9 It's also -- I also want to mention the fact that
10 Plaintiffs claim that it's purely certain individuals who are
11 boxed out of the political process. That is completely false.
12 H.B. 142 repeals H.B. 2. People who -- who were proponents of
13 H.B. 2, who at one point commanded a majority of the state
14 legislature, cannot pursue their preferred policies in their
15 local jurisdictions. Everybody -- everybody on a very wide
16 spectrum of potential policy preferences, all the way from
17 Plaintiffs on one hand to H.B. 2 proponents on the other hand,
18 nobody in that range can pursue any of their preferred policies
19 at the local level. They are all funneled into the General --
20 into the General Assembly. That means that any -- you know,
21 Plaintiffs emphasize that it's about a particular topic that
22 only operates prospectively, but one way or the other it means
23 that, whatever anybody's policy preferences, everybody has to
24 do it in one place. That is the essence of the generalized
25 grievance that is categorically inadequate to invoke this

1 Court's jurisdiction.

2 The other thing I point out is the -- is the way the
3 Court -- is the redressability -- or, rather, the issues having
4 to do with the reference to the status quo. There are two ways
5 to address the status quo. One of them is retrospectively.
6 The other is prospectively. Or two ways to address the effect
7 of H.B. 142 rather. I think, as far as I was hearing the
8 Plaintiffs, try as they might, the only difference between the
9 status quo ante prior to H.B. 2 and today that they can think
10 of is the -- is Mr. Carcaño's alleged inability now to get, you
11 know, his written permission slip from UNC. But, again, that's
12 not an injury.

13 Then you look at that injury prospectively. What is the
14 difference between the status quo right now and the status quo
15 if H.B. 142 were repealed and enjoined? The status quo in the
16 future or the potential -- the future state of affairs is
17 precisely the same as the current state of affairs, with the
18 exception of Plaintiffs' pure speculation about the -- about
19 the decisions of third parties who aren't in front of the Court
20 and in many cases who couldn't be constrained by parties in
21 front of the Court; and, of course, there's no threat of
22 enforcement right now.

23 I should also point out as one final point the Plaintiffs
24 have this odd textual theory that regulation of -- that the
25 preempted field under H.B. 142 includes posting restrooms

1 for -- as men's rooms versus women's rooms, and they say
2 that -- that by posting that, that shows there's -- this is a
3 discriminatory practice.

4 **THE COURT:** I thought I understood the argument to be
5 that that is a form of regulation that they're not challenging,
6 but it's nevertheless a form of regulation. Therefore, there
7 is some regulating going on even though the statute says you
8 can't.

9 Am I -- is that accurate?

10 **MR. STRANGIO:** That's accurate, Your Honor.

11 **MR. SCHWARTZ:** And that is how I understood their
12 argument.

13 One, that -- I wanted to point out that, one, not only are
14 they not challenging the separation of men's and women's
15 facilities; two, they aren't asking this Court to adopt a rule
16 on -- a categorical rule on access to facilities; three, this
17 Court wouldn't have authority to because that's an issue purely
18 of -- I mean, it's a combination of interpretation of state law
19 and of the meaning that property owners attach to their posting
20 of particular signs on particular rooms; and plus, of course,
21 it's a weirdly atextual view of what the term "regulation"
22 means.

23 I think the UNC Defendants' brief had the sharpest response
24 on that point, which is to say that regulation is a -- you
25 know, it's a generally applicable, publicly posted thing that

1 has some kind of official promulgation process. Nobody -- I
2 don't think anybody considers as a textual matter posting a
3 sign, for example, for trespass law purposes as being a form of
4 regulation.

5 **THE COURT:** Well, but what if they change the signs?
6 What if the sign said "Men's Room (Based on Anatomy)"?
7 Wouldn't that be a form of regulation?

8 **MR. SCHWARTZ:** That's a -- it's a hypothetical.
9 Obviously, it's hard to --

10 **THE COURT:** But it's responsive to your point and I
11 think is -- I think the issue with the men's and women's room
12 is it's a convention that's been used for decades, if not
13 centuries, and so it is what it is.

14 **MR. SCHWARTZ:** Uh-huh. I'm not sure what the answer
15 would be if, for example, UNC wanted to -- wanted to post a --
16 wanted to put up "Men's" and "Women's" based on gender
17 identity. I think that would probably -- I think that would at
18 least arguably be a form of regulation that would be preempted,
19 but it's difficult to say and we haven't briefed the issue.

20 **THE COURT:** All right. Anything further?

21 **MR. SCHWARTZ:** No, Your Honor.

22 **THE COURT:** So why -- on the political process claim,
23 their argument is that you say it applies equally to all sides;
24 but as a matter of practice and history would say, they're the
25 ones bearing the brunt of the lack of any protections. So

1 they're being discriminated against, Plaintiffs are; and
2 therefore the preemption provision kind of locks in place the
3 current discriminatory environment for them; and so it does
4 have the effect of injuring them. It is designed to affect
5 them more so than anyone else.

6 **MR. SCHWARTZ:** One, I think that that's -- I don't
7 think that that's possible because, remember, H.B. 142 repeals
8 H.B. 2 and just everybody, on a completely even-handed basis,
9 they're all funneled into the same place.

10 Another thing is, to put kind of the most favorable gloss
11 on their argument, as you've done, Your Honor, it is possible
12 that they're arguing that H.B. 142 is locking in a
13 discriminatory regime, but they -- I mean, it's possible that
14 that's what they're arguing. I don't concede the point. But,
15 of course, they aren't challenging the current regime of access
16 to any kind of facility. They aren't saying that the trespass
17 laws are discriminatory. They're raising a facial challenge
18 where they aren't challenging any particular -- they aren't
19 challenging any particular circumstances of access to
20 particular facilities.

21 And it's important to -- and it's important to consider --
22 consider the analogy between this case and between *Romer* and
23 *Schuetz*. In *Schuetz*, the Michigan affirmative action
24 constitutional amendment case, in that case a -- a-- in that
25 case a -- you know, an important area of public policy, the use

1 of affirmative action was prohibited; and in that case,
2 they're -- and in that case, the Supreme Court said, you know,
3 that's something that's within the authority of -- it's within
4 the authority of people to --

5 **THE COURT:** Aren't those cases at least
6 distinguishable on the ground that the states were trying to
7 prohibit any discrimination and at the same time prevent any
8 affirmative action, and the courts held that if the Fourteenth
9 Amendment meant anything that equal means equal and therefore
10 you have no right to a preference? So for that reason, the
11 claim that the plaintiffs were injured because they could no
12 longer get their preferences at the level they wanted them
13 didn't amount to a claim because they don't have a right to a
14 preference.

15 **MR. SCHWARTZ:** Well, it's similar -- it's similar
16 here. Plaintiffs aren't arguing that they have a right to
17 access any particular facility. They aren't asking for this
18 Court to enter such a rule.

19 **THE COURT:** Well, they are asking for access to
20 facilities that match their gender identity, right?

21 **MR. SCHWARTZ:** Well, not in -- not in the Fourth
22 Amended Complaint. In this complaint, all they're asking for
23 is -- is an injunction against H.B. 142. They aren't asking
24 for a -- they aren't asking for a statewide rule that would
25 allow any particular person access to any particular facility.

1 **THE COURT:** Hold on just a minute.

2 (Pause in the proceedings.)

3 **MR. SCHWARTZ:** Your Honor, on that point I can refer
4 to page 11, Note 5, of the Plaintiffs' opposition brief where
5 they say that -- where they waive any argument they can
6 challenge the absence of affirmative nondiscrimination
7 protections based on gender identity. And then on page 42,
8 they disclaim any intent to seek enactment and administration
9 of nondiscrimination policies that do not currently exist.
10 Plus, of course, they aren't -- they aren't challenging the
11 separation of -- challenging the customary separation of
12 facilities by men and women.

13 **THE COURT:** Paragraph D of the prayer for relief seeks
14 an injunction requiring Defendants to ensure individuals,
15 including transgender people, to use single sex, multi-user
16 facilities in accordance with their gender identity without
17 fear of arrest or other penalty in all public schools,
18 universities, et cetera, and requiring Defendants in their
19 official capacities to allow local governments to enact and
20 continue to enforce antidiscrimination protections.

21 **MR. SCHWARTZ:** They did mention that in their
22 complaint, but in their opposition to the motions to -- motions
23 to dismiss, they appear to have waived that.

24 **THE COURT:** You're saying they've waived it.

25 Is that true? Is that waived now?

1 **MR. STRANGIO:** No, Your Honor, I don't think that the
2 footnote that Defendants are pointing to is a waiver of that.

3 But, again, this is -- the relief being sought is an
4 injunction from H.B. 142 being operated to that effect and that
5 ability to go back to the status quo ante, which would include
6 the ability to access those facilities as to the individual
7 Plaintiffs as they all were prior to; and the injunction that
8 we're seeking would strike down H.B. 142, which is itself the
9 barrier to that. We're not seeking anything broader than that
10 in this case.

11 Although, as the -- as the Title IX claim with respect to
12 H.B. 2, the nominal damages, made clear, we think that it would
13 be unlawful to exclude people from restrooms based on unlawful
14 sex discrimination, but the order that we're seeking is an
15 order striking down H.B. 142 as the source of the bar that's
16 currently in place.

17 **THE COURT:** So any request that I enjoin on a
18 mandatory basis the Defendants to require them to affirmatively
19 give permission, if you will, to facilities?

20 **MR. STRANGIO:** No, Your Honor, not under the H.B. 142
21 claims. With respect to H.B. 2 and the nominal damages claims,
22 that seeks a different form of relief, but going back to the
23 standing --

24 **THE COURT:** That's only if I strike 142 down.

25 **MR. STRANGIO:** Well, the nominal damages claims exist

1 regardless, but as to -- in terms of the injunction question --

2 **THE COURT:** Yes.

3 **MR. STRANGIO:** -- yes -- no, there's not an
4 affirmative request for something mandatory. Although at this
5 stage, with respect to the motion to dismiss, I'm not sure it's
6 necessary to figure out every nature of the relief and where
7 would it be proper. For purposes of standing and the injury,
8 H.B. 142 is the source of injury.

9 If I could just take a moment to respond to something --

10 **THE COURT:** Let me let him finish and I'll give you
11 just a moment.

12 **MR. SCHWARTZ:** Your Honor, I think Plaintiffs' counsel
13 just confirmed what I was saying; that all they're asking for
14 is an injunction against -- is an injunction against H.B. 142.
15 Then they -- then all they have -- then all they get is the
16 opportunity to pursue -- pursue political processes in other
17 jurisdictions, which wasn't their right to begin with, and they
18 weren't injured by being deprived of, and all they get
19 supposedly is to -- is to -- is to -- and it wouldn't get them
20 any certainty either because the application of trespass law
21 and the promulgation of facility access policies would be left
22 in the hands of third parties making their own -- making their
23 own unconstrained choices.

24 **THE COURT:** All right. Thank you.

25 Anybody else want to be heard?

1 I'll be happy to hear from you briefly as to his points
2 that he mentioned.

3 **MR. STRANGIO:** Yeah, just briefly, Your Honor. I want
4 to respond to two things he said.

5 The first concerns this question of regulation of restrooms
6 and UNC's contention that regulation is only, you know,
7 something that is promulgated in a ruling. In that sense, that
8 would seem to be wholly inconsistent with their position that
9 they can't provide Joaquín Carcaño with permission on a one-off
10 basis, for example, to use the restroom; that they are somehow
11 forbidden even from engaging in the type of dialogue with him
12 about whether or not he is authorized as an individual. And
13 he's alleged in his complaint that they will not -- they will
14 not do that, so that seems inconsistent with the position that
15 somehow a regulation of restrooms is only a policy rule.
16 They're not -- they're not following that, at least as to the
17 allegations in the complaint, which need to be taken as true.

18 And I think it's important that we note that there's so
19 many inconsistencies here with respect to how the law is
20 actually being applied versus the representations made in
21 court, and that the complaint has to control I think going back
22 to -- and we had this conversation last time with respect to
23 UNC that came in, made the same argument that they weren't
24 doing anything, but again, they are doing something. They're
25 telling --

1 **THE COURT:** Is your -- excuse me. I'm sorry to
2 interrupt you, but if I don't ask when I think of it, I may
3 lose the thought. Is your challenge a facial challenge?

4 **MR. STRANGIO:** It's crafted as a facial challenge,
5 yes, because it is -- you know, the law is facially doing this.

6 **THE COURT:** If that's the case then, how do I consider
7 your arguments about what the University may or may not be
8 saying and your client's statements about, you know, how he's
9 trying to get permission and all of that? That's inconsistent
10 with a facial challenge, is it not?

11 **MR. STRANGIO:** No, Your Honor. I think it just -- it
12 shows that the law can't operate in a way with respect to -- so
13 I guess if Your Honor wants to take it as an as-applied
14 challenge, then that would be possible.

15 **THE COURT:** I'm asking you what -- what you're doing.

16 **MR. STRANGIO:** So with respect to Section 3, it's --
17 with respect to the equal protection claims, it's a facial
18 challenge. You know, it's a law that is facially violative of
19 equal protection. It's a law that under *Arlington Heights* was
20 motivated for a very particular purpose. It boxes people out
21 of the political process and in a particular way.

22 With respect to due process, I will -- I will concede that
23 due process is generally considered first in an as-applied
24 basis; and so with respect to the vagueness, if we're looking
25 at the injury, it's as applied -- the H.B. 142 is operating as

1 applied to transgender individuals. Although it's a little
2 bit -- you know, it's a little bit unusual context because,
3 read literally, the law -- it's just not being followed, except
4 with respect to transgender individuals. So I would say, as
5 applied to transgender individuals, it's creating a due process
6 violation both with respect to the fair-notice requirement and
7 with respect to -- with respect to discriminatory enforcement.

8 And I want to respond quickly to the idea that the trespass
9 law is the source of the injury, and that somehow Plaintiffs
10 should have come in and challenged that. The trespass law is
11 not the source of the injury. H.B. 142 is the source of the
12 injury that the Plaintiffs have alleged. H.B. 142 is the
13 reason that UNC won't communicate with Joaquín Carcaño about
14 whether he's authorized to enter the bathroom. It's the source
15 of the denial of equal protection.

16 It's -- you know, it reminds me of the Defense of Marriage
17 Act, for example, where you had a definitional provision in
18 federal law. It wasn't that the individuals who were harmed by
19 that went and challenged every reference to marriage in federal
20 law. The source of the injury was DOMA and the operation of
21 DOMA.

22 And just like that, the source of the injury is H.B. 142.
23 That its operating in concert with other laws that are not
24 otherwise problematic does not mean you need to come into court
25 and challenge those laws. The source of the injury is

1 H.B. 142. The injury that the Plaintiffs are seeking to
2 redress is -- is the injury that flows from H.B. 142.

3 And if I could just point Your Honor to -- to the
4 North Carolina -- *Northeast Florida* cases and *Arlington Heights*
5 again for two reasons before I sit down and I promise that I
6 will. They're instructive for two reasons. The first is that
7 they explain that on an equal protection theory it is the
8 barrier that is the injury, not necessarily the receipt of the
9 benefit in those cases that the people were seeking.

10 But it's also instructive outside of the equal protection
11 context to show that for standing purposes you do not need
12 to -- to point -- you do not need to eliminate every single
13 potential source of the injury. If there is a bar in place, if
14 there is an injury that is being caused by an operation of law,
15 that that's sufficient for standing purposes. There may be
16 other sources or other uncertainties, as the Defendants have
17 reframed this. That's not the question for standing. And that
18 the standing or injuries that are alleged are traceable to this
19 law and that's what we're challenging here.

20 Thank you. Do you have any other questions?

21 **THE COURT:** As to the facial challenge to 142, how is
22 the University of North Carolina at all responsible for any of
23 142?

24 **MR. STRANGIO:** As to section -- so going back to --

25 **THE COURT:** Just as to the facial challenge. They --

1 **MR. STRANGIO:** So the -- just as to Section 3?

2 **THE COURT:** Any aspect of 142. How is UNC responsible
3 for -- on a facial challenge to H.B. 142?

4 **MR. STRANGIO:** UNC is responsible because they are
5 not -- they are operating their facilities in such a way
6 that --

7 **THE COURT:** Isn't that an as-applied challenge?

8 **MR. STRANGIO:** Well, there's two parts to that.
9 There's the regulated access and then with respect to the
10 nondiscrimination provisions as a whole.

11 And let me just look back to -- to the law. I guess
12 it's -- if they're not considered a local government, then
13 that's not relevant for purposes of Section 3; but in terms of
14 the facially discriminatory character of the law, the
15 motivating -- the motivating impetus behind the law, that is
16 not just those who pass the law that are responsible, but those
17 who are enforcing it, an unconstitutional law, themselves --

18 **THE COURT:** Isn't that an applied challenge?

19 **MR. STRANGIO:** Well, no, Your Honor, I don't think so.
20 The only case I can think of off the top of my head is a case
21 that we -- that we litigated in a wholly different context.
22 But where you have a prison -- for example, where prison
23 officials -- there's an unconstitutional law of the legislature
24 and it's facially unconstitutional and prison officials are
25 saying, "Well, we don't like it, but we're following it." And

1 that following a facial unconstitutional law is depriving
2 individuals of equal protection; that UNC would still be
3 responsible for that and would be a proper party before this
4 Court. We can do further -- further briefing, Your Honor, on
5 this question if you have -- if you have further questions
6 about it.

7 **THE COURT:** All right. Thank you.

8 All right. Give me just a second.

9 (Pause in the proceedings.)

10 **THE COURT:** So let me address this question to the
11 Attorney General's office. You asked to be able to respond to
12 the Fourth Amended Complaint after I decided whether to enter
13 into the consent decree; is that right?

14 **MS. VYSOTSKAYA:** That's correct.

15 **THE COURT:** And I said you would have 30 days after
16 whatever decision I made as to the motion to dismiss before you
17 then had an opportunity to respond.

18 **MS. VYSOTSKAYA:** So the order stated that we will have
19 30 days after you rule on whether to enter -- whether to
20 approve the consent decree. We will have 30 days to respond
21 from that date.

22 **THE COURT:** All right.

23 **MS. VYSOTSKAYA:** And, Your Honor, it's docket entry --

24 **THE COURT:** It says 226.

25 **MS. VYSOTSKAYA:** -- 226. Yes, Your Honor.

1 **THE COURT:** All right. Give me just a minute.

2 (Pause in the proceedings.)

3 **THE COURT:** So what I said is that I would resolve the
4 motions to dismiss first because I didn't know whether there
5 would be a jurisdictional issue and the arguments were made
6 that I didn't -- if I didn't have jurisdiction, then I couldn't
7 enter into a consent decree, correct?

8 **MS. VYSOTSKAYA:** My reading -- those were the
9 arguments and my reading of the case law would confirm that the
10 Court has to have subject-matter jurisdiction.

11 **THE COURT:** The Court what?

12 **MS. VYSOTSKAYA:** Has to have subject matter
13 jurisdiction.

14 **THE COURT:** So you agree that I have to determine I
15 have subject-matter jurisdiction before I get to the issue of
16 the consent order?

17 **MS. VYSOTSKAYA:** That's correct. Or is a part of the
18 claim -- if the Court retains at least a part of the claim,
19 then, yes, you have to have subject-matter jurisdiction in
20 order to --

21 **THE COURT:** All right. So my intention is to resolve
22 the motions to dismiss first. Then we'll see where we are at
23 that point; and if there are portions that are left, then I
24 will resolve the issue of the consent decree.

25 And I don't believe I have any response from anybody else

1 on the consent decree. Were you anticipating you'd have an
2 opportunity to address that issue?

3 **MR. SCHWARTZ:** Your Honor, yes. Your order reflects
4 November 2nd, 2017, Docket No. 228: It is hereby ordered that
5 the time for any party to respond to the Joint Motion for Entry
6 of a Consent Decree shall be extended until 30 days following
7 the date of this Court's disposition of the pending motions to
8 dismiss.

9 **THE COURT:** I just want to make sure we're all on the
10 same page then. So I'll resolve the current motions and then
11 that will kick in potentially deadlines depending on what I
12 resolve. All right.

13 **MS. VYSOTSKAYA:** Yes, Your Honor.

14 **THE COURT:** All right. Anybody have anything else
15 they want to add before we --

16 **MS. LEJNIEKS:** Your Honor, can I just clarify? Right
17 now discovery is on hold and there are two conflicting orders
18 in place, one that was a motion to dismiss dismissal and the
19 other that relates to the consent decree. We are under the
20 assumption that discovery is stayed until the later of those
21 issues are resolved. I just wanted to confirm that.

22 **THE COURT:** Is there any objection to that?

23 **MR. STRANGIO:** No, Your Honor.

24 **MS. LEJNIEKS:** Great. Thank you.

25 **THE COURT:** All right. Those were issued -- at least

1 one by the magistrate judge perhaps?

2 **MS. LEJNIEKS:** Yeah, the magistrate judge issued an
3 order -- it's Docket No. 212 -- on September 8th, 2017, and I
4 believe that one is tied to after the deadline for responding
5 to the Fourth Amended Complaint. And then the other order is
6 on November 8th, 2017. That's Docket 232. That one is tied to
7 the consent decree. So while we had your attention, Your
8 Honor, I thought it was worth clarifying so that we're on the
9 same page.

10 **THE COURT:** All right. So it would be the later of
11 either of those.

12 **MS. LEJNIEKS:** Great. Thank you, Your Honor.

13 **MR. STRANGIO:** No objection. Thank you.

14 **THE COURT:** Okay. All right. In the absence of
15 anything else -- and thank you for coming in. I appreciate
16 your briefing and your work on this. It was well done. I'll
17 issue a decision just as soon as I can.

18 Okay. Please adjourn court until our two o'clock session.

19 (Proceedings concluded at 12:09 p.m.)
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C E R T I F I C A T E

I, LORI RUSSELL, RMR, CRR, United States District Court
Reporter for the Middle District of North Carolina, DO HEREBY
CERTIFY:

That the foregoing is a true and correct transcript of the
proceedings had in the within-entitled action; that I reported
the same in stenotype to the best of my ability and thereafter
reduced same to typewriting through the use of Computer-Aided
Transcription.



Lori Russell, RMR, CRR
Official Court Reporter

Date: 2/20/19